UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MASTEC ADVANCED TECHNOLOGIES, **Petitioner,** **v.** **NATIONAL LABOR RELATIONS BOARD,** **Respondent.**	**District Court Case No. 1:20-mc-0022 (GMH)** **D.C. Circuit Case No. 11-1274**

SPECIAL MASTER'S
REPORT AND RECOMMENDATION

The Petitioner in this case before the D.C. Circuit, MasTec Advanced Technologies ("MasTec"), is a company that provides television satellite installation and maintenance services for DirecTV, Inc. In 2011, the National Labor Relations Board ("NLRB") issued a decision finding that MasTec had engaged in unfair labor practices in violation of the National Labor Relations Act (the "NLRA" or the "Act"), 29 U.S.C. § 151 *et seq.*, when it illegally discharged 26 employees who had made statements on a television news broadcast concerning an ongoing dispute regarding the company's pay practices. The order appended to the decision (the "NLRB Order") required MasTec not only to refrain from engaging in activity violative of the NLRA, but also to take certain affirmative actions to remedy its unlawful conduct within specified time periods. MasTec sought review in the D.C. Circuit, which enforced the NLRB's decision in 2016. Thereafter, in 2019, the NLRB filed a Petition for Adjudication in Civil Contempt and for Other Civil Relief (the "Contempt Petition") against MasTec, arguing that the company should be held in civil contempt for failing to comply with some of those affirmative duties imposed in the NLRB Order as enforced by the D.C. Circuit. Pursuant to Rule 48(a) of the Federal Rules of Appellate Procedure, the D.C.

Circuit appointed the undersigned as Special Master to conduct proceedings necessary to recommend factual findings and a disposition of the Contempt Petition.

Following that appointment, the parties engaged in discovery pursuant to the Federal Rules of Civil Procedure. The NLRB has now filed a motion for summary judgment on the Contempt Petition, seeking an order holding MasTec in civil contempt; directing it to purge that contempt by fully complying with the NLRB Order (to the extent that it has not already done so); compelling certain other affirmative actions to inform employees of the contempt adjudication; requiring it to pay the NLRB's costs, including attorney's fees, incurred in bringing this matter; and establishing prospective fines for noncompliance in order to ensure that MasTec satisfies its ongoing obligations under the NLRB Order. The following comprises the Special Master's recommended factual findings, conclusions of law, and proposed disposition of the Contempt Petition.[1] In sum, the undersigned recommends granting the Contempt Petition to the extent that it seeks a finding that MasTec is in contempt and granting-in-part and denying-in-part the NLRB's requested remedies.

I. LEGAL STANDARDS

A. Summary Judgment

Summary judgment is appropriate when the moving party demonstrates that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).[2] "A fact is material if it 'might affect the outcome of the suit under the governing law,' and a dispute about a material fact is genuine 'if the evidence is such that a

[1] The most relevant documents for the purposes of this Report and Recommendation are (1) the Contempt Petition (ECF No. 2); (2) NLRB's Motion for Summary Judgment and its attachments (ECF No. 26 through ECF No. 26-27); (3) MasTec's opposition memorandum and its attachments (ECF No. 33 through ECF No. 33-14); (4) the NLRB's response to MasTec's additional facts and its attachments (ECF No. 34 through ECF No. 34-4); and (5) the NLRB's reply memorandum and its attachments (ECF No. 35 through ECF No. 35-4). The page numbers cited herein are those assigned by the Court's CM/ECF system.

[2] The undersigned ordered that proceedings in this matter would be governed by the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and this Court's Local Civil Rules. ECF No. 9 at 3.

reasonable jury could return a verdict for the nonmoving party.'" *Steele v. Schafer*, 535 F.3d 689, 692 (D.C. Cir. 2008) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). It is well-established that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge at summary judgment." *Barnett v. PA Consulting Grp., Inc.*, 715 F.3d 354, 358 (D.C. Cir. 2013) (quoting *Pardo-Kronemann v. Donovan*, 601 F.3d 599, 604 (D.C. Cir. 2010)). Indeed, a court's role in deciding a summary judgment motion is not to "determine the truth of the matter, but instead [to] decide only whether there is a genuine issue for trial." *Id.* (quoting *Pardo-Kronemann*, 601 F.3d at 604).

Initially, the moving party has the burden of demonstrating the absence of a genuine dispute as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met this burden, the nonmoving party must designate "specific facts showing that there is a genuine issue for trial." *Id.* at 324. In order to establish that a fact is or is not genuinely disputed, a party must (a) cite specific parts of the record—including "depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, [and] interrogatory answers"—in support of its position, or (b) demonstrate that the materials relied upon by the opposing party do not actually establish the absence or presence of a genuine dispute. Fed. R. Civ. P. 56(c)(1).

While the court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in the non-movant's favor, *Grosdidier v. Broad. Bd. of Governors*, 709 F.3d 19, 23–24 (D.C. Cir. 2013), the non-moving party must show more than "[t]he mere existence of a scintilla of evidence in support of" his or her position; instead, "there must be evidence on which the jury could reasonably find" for the non-moving party. *Anderson*, 477 U.S. at 252. That standard is not met by showing "that there is some metaphysical doubt as to the material

facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Thus, a party's conclusory allegations or unsubstantiated speculation will not create a genuine issue of material fact. *See*, *e.g.*, *Arrington v. United States*, 473 F.3d 329, 338 (D.C. Cir. 2006); *Hutchinson v. CIA*, 393 F.3d 226, 229 (D.C. Cir. 2005); *Carney v. Am. Univ.*, 151 F.3d 1090, 1094 (D.C. Cir. 1998); *Mokhtar v. Kerry*, 83 F. Supp. 3d 49, 61 (D.D.C. 2015), *aff'd*, No. 15-5137, 2015 WL 9309960 (D.C. Cir. Dec. 4, 2015). Nor will affidavits or declarations submitted by a party in connection with a motion for summary judgment that attempt to refute that party's prior admissions. *See, e.g.*, *Grynberg v. Bar S Servs., Inc.*, 527 F. App'x 736, 739 (10th Cir. 2013) ("[A party's] attempt to disavow [ ] earlier judicial admissions . . . with seemingly contrary evidence at summary judgment does not create a disputed issue of fact."); *accord Praetorian Ins. Co. v. Site Inspection, LLC*, 604 F.3d 509, 514 (8th Cir. 2010) ("[A]s a general rule, admissions made in response to a Rule 36 request for admissions are binding on that party." (alteration in original) (quoting *Bender v. Xcel Energy, Inc.*, 507 F.3d 1161, 1168 (8th Cir. 2007))); *Mo. Housing Dev. Comm'n v. Brice*, 919 F.2d 1306, 1314 (8th Cir. 1990) ("[A]dmissions in the pleadings . . . are in the nature of judicial admissions binding on the parties, unless withdrawn or amended." (ellipses in original) (quoting *Scott v. Comm'r*, 117 F.2d 36, 40 (8th Cir. 1941))); *United States v. Kasuboski*, 834 F.2d 1345, 1350 (7th Cir. 1987) ("Affidavits and depositions entered in opposition to summary judgment that attempt to establish issues of fact cannot refute [ ] admissions."); *Davis v. A.G. Edwards & Sons, Inc.*, 823 F.2d 105, 108 (5th Cir. 1987) ("[F]actual assertions in pleadings are . . . judicial admissions *conclusively* binding on the party that made them." (alterations in original) (quoting *White v. ARCO/Polymers*, 720 F.2d 1391, 1396 (5th Cir. 1983))); *Essroc Cement Corp. v. CTI/D.C., Inc.*, 740 F. Supp. 2d 131, 140–41 (D.D.C. 2010) (citing *Praetorian Ins. Co.*, 604 F.3d at 514).

B. Civil Contempt

"There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt." *Shillitani v. United States*, 384 U.S. 364, 370 (1966). "Civil contempt is ordinarily used to compel compliance with an order of the court" or "to 'compensate[ ] the complainant for losses sustained.'" *Cobell v. Norton*, 334 F.3d 1128, 1145 (D.C. Cir. 2003) (alteration in original) (quoting *Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 829 (1994)).

The party seeking a finding of civil contempt must make a *prima facie* showing that the "putative contemnor has violated an order that is clear and unambiguous." *Broderick v. Donaldson*, 437 F.3d 1226, 1234 (D.C. Cir. 2006); *see also SEC v. Bilzerian*, 112 F. Supp. 2d 12, 16 (D.D.C. 2000) ("A party is in contempt of court when he 'violates a definite and specific court order requiring him to perform or refrain from performing a particular act or acts with knowledge of that order.'" (quoting *SEC v. Bankers Alliance Corp.*, 881 F. Supp. 673, 678 (D.D.C. 1995))), *aff'd*, 75 F. App'x 3 (D.C. Cir. 2003). "In civil contempt proceedings the clear and convincing evidence standard applies and the failure to comply with the court decree need not be intentional." *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1183 (D.C. Cir. 1981) (footnote omitted); *see also, e.g.*, *NLRB v. Local 3, Int'l Brotherhood of Elec. Workers*, 471 F.3d 399, 403 (2d Cir. 2006) ("The Board had the burden of proving [ ] alleged contempt before the Special Master by clear and convincing evidence. Because the Board sought a judgment of civil rather than criminal contempt, it did not have to show willfulness . . . ." (internal citations omitted)); *NLRB v. Decaturville Sportswear Co.*, 518 F.2d 788, 790 (6th Cir. 1975) ("To hold [parties] in civil contempt we must find clear and convincing evidence in the record which proves that [the parties] have violated a judgment of this Court."). That is,

> [a] party moving for civil contempt must show, by clear and convincing evidence, that "(1) there was a clear and unambiguous court order in place; (2) that order required certain conduct by [the putative contemnor]; and (3) [the putative contemnor] failed to comply with that order."

CFTC v. Trade Exch. Network Ltd., 117 F. Supp. 3d 22, 26 (D.D.C. 2015) (quoting *United States v. Latney's Funeral Home, Inc.*, 41 F. Supp. 3d 24, 29–30 (D.D.C. 2014)). "[A litigant's] intent in failing to comply . . . is irrelevant." *Id.*; *see also, e.g.*, *Bilzerian*, 112 F. Supp. 2d at 16. If the party seeking contempt sanctions makes that *prima facie* showing, the burden shifts to the putative contemnor to produce evidence justifying noncompliance on the basis of inability or good faith and substantial compliance. *See Bilzerian*, 112 F. Supp. 2d at 16 & n.5; *see also In re Fannie Mae Sec. Litig.*, 552 F.3d 814, 822 (D.C. Cir. 2009); *Food Lion, Inc. v. United Food & Com. Workers Int'l Union*, 103 F.3d 1007, 1017 (D.C. Cir. 1997); *SEIU Nat'l Indus. Pension Fund v. Artharee*, 48 F. Supp. 3d 25, 30 (D.D.C. 2014) ("In civil contempt proceedings, a party can justify its failure to comply with a court order by establishing its inability to comply or good faith substantial compliance."). "To prove good faith substantial compliance, the contemnor must show that it 'took all reasonable steps within [its] power to comply.'" *Artharee*, 48 F. Supp. 3d at 30 (alteration in original) (quoting *Int'l Painters & Allied Trades Indus. Pension Fund v. ZAK Architectural Metal & Glass LLC*, 736 F. Supp. 2d 35, 40 (D.D.C. 2010)).

II. FINDINGS OF FACT

The following facts are undisputed, either because they have been admitted in a party's response to the other party's statement of undisputed material facts, because they appear in one party's statement of undisputed material facts and have not been properly controverted, or because they appear in the record provided to the undersigned in connection with this summary judgment

motion without contradiction from other evidence in the record.[3] Some facts also derive from the record of this case in the D.C. Circuit and from the publicly-available records of proceedings in the U.S. District Court for the Middle District of Florida related to the enforcement of an administrative subpoena issued by the NLRB. *See, e.g.*, *Fletcher v. Evening Star Newspaper Co.*, 133 F.2d 395, 395–96 (D.C. Cir. 1942) (noting that it is "too well settled to be seriously questioned" that a court addressing a motion for summary judgment may take judicial notice of its own records); *Rogers v. District of Columbia*, 880 F. Supp. 2d 163, 166 (D.D.C. 2012) (noting that a court may take judicial notice of public court records, including docket sheets in other courts).

A. Procedural History

1. Proceedings Before the NLRB, the D.C. Circuit, and the Supreme Court Until the Denial of MasTec's Petition for a Writ of *Certiorari* in October 2017

As noted, MasTec provides television satellite installation and maintenance services for DirecTV. The NLRB issued a decision and order on July 21, 2011, finding that both MasTec and DirecTV had violated the National Labor Relations Act in various ways. ECF No. 33-4 at 2 (Fact No. 2); *see also* ECF No. 26-5 at 6–7. More specifically, the NLRB found that MasTec had, among other things, maintained unlawful work rules and illegally discharged 26 employees at its Orlando, Florida location for publicly airing workplace grievances and that DirecTV had engaged in an unfair labor practice by "causing the termination" of those 26 employees. ECF No. 33-4 at 2 (Fact

[3] Over and over, MasTec has disputed facts asserted in the NLRB's statement of undisputed material facts, notwithstanding that MasTec has previously admitted those facts in, for example, its answer to the Petition or in answers to a Request for Admission ("RFA") posed by the NLRB. But, as noted above, a party cannot manufacture a dispute of material fact by contradicting its prior admissions. *See, e.g.*, *Grynberg*, 527 F. App'x at 739 ([A party's] attempt to disavow [ ] earlier judicial admissions . . . with seemingly contrary evidence at summary judgment does not create a disputed issue of fact."); *accord Praetorian Ins. Co.*, 604 F.3d at 514; *Mo. Housing Dev. Comm'n*, 919 F.2d at 1314; *Kasuboski*, 834 F.2d at 1350; *Davis*, 823 F.2d at 107–08; *Essroc Cement Corp.*, 740 F. Supp. 2d at 140–41. Similarly unavailing are MasTec's attempts to dispute facts or assert additional facts by pointing to evidence or affidavits that do not support positions that the company now asserts. These instances are noted in the discussion below either with an explanation in an appended footnote or, sometimes, merely by citing the admissions in the record that support the facts the Court has found.

No. 2); ECF No 26-5 at 6–7. The agency's order—the NLRB Order—required MasTec and its "officers, agents, successors, and assigns" to, in relevant part,

> 1. Cease and desist from
>
> (a) Terminating any employee for engaging in protected concerted activities.
>
> (b) Maintaining any rules, including confidentiality rules, that unlawfully restrict employees' ability to discuss their wages, hours, and other terms and conditions of employment with anyone.
>
> (c) Maintaining any overly broad solicitation and distribution rules or other rules that require employees to obtain permission before engaging in protected concerted activities.
>
> (d) Threatening employees with facility closure and other unspecified reprisals because they engage in protected concerted activities.
>
> (e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
>
> 2. Take the following affirmative action necessary to effectuate the policies of the Act.
>
> (a) Within 14 days from the date of this Order, offer Jouvani Alicea, Marlon Binet, Christopher Creary, Leroy Davis, Donovan Edwards, Sebastian Eriste, Hugh Fowler, Joseph Guest, Delroy Harrison, James Hehmann, Mark Hemann, Michael Hermitt, Federico Hoy, Fernando Hoy, Ariel Kelly, Shervoy Lopez, Ricardo Perlaza, Sergio Pitta, Noel Rodriguez, Rudy Rodriguez, Fernando Sando, Olmy Talent, Diego Velez, Nerio Vera, Ralph Wilson, and Carlos Zambrano full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their . . . rights or privileges previously enjoyed.
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> * * *
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> (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide . . . all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(e) Rescind the confidentiality policy and the solicitation and distribution rules as they existed in March 2006.[4]

(f) Notify all employees who received the employee handbook that existed in March 2006 that these rules have been rescinded and will no longer be enforced.

(g) Within 14 days after service by the Region, post at its facility in Orlando, Florida, copies of the attached notices marked "Appendix A" and "Appendix C" and within that same time period post at all its other facilities, nationwide, copies of the attached notice marked "Appendix B."[] Copies of the notices, on forms provided by the Regional Director for Region 12, after being signed by the Respondents' authorized representatives, shall be posted by Respondent MasTec and maintained for 60 consecutive days. . . . In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email and/or other electronic means, if the Respondent customarily communicates with its employees by such means . . .[5]

(h) Within 21 days after the service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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[4] According to the Administrative Law Judge's decision that the NLRB reviewed, the confidentiality policy prohibiting employees from discussing employee names and compensation with anyone inside or outside MasTec violated the Act because "such discussions among employees are usually a precursor to protected organizational activity." ECF No. 26-5 at 13. The solicitation and distribution rules prohibited employees from engaging in solicitation on company property and from distributing printed matter on company property, thereby "restrict[ing] employees [both] from engaging in protected solicitation . . . regardless of whether the employee was on worktime or in a work area" and from "engag[ing] in distribution of protected material without permission regardless of the site of the distribution and their work status." *Id.*

[5] Those notices, the texts of which are included as appendices to the NLRB's decision, inform employees of their rights under the Act and state that the NLRB had found that MasTec and DirecTV had "violated Federal labor law." ECF No. 26-5 at 10–12.

ECF No. 33-4 at 2–4 (Fact No. 4).[6]

In August 2011, MasTec and DirecTV each sought review of the NLRB's decision by filing petitions for review with the D.C. Circuit and the cases were consolidated. Petition for Review, *DirecTV, Inc. v. NLRB*, 837 F.3d 25 (D.C. Cir. 2016) (Nos. 11-1273, 11-1274); *MasTec Advanced Techs. v. NLRB*, No. 11-1274 (D.C. Cir. Aug. 8, 2011) (order consolidating cases).[7] On September 16, 2016, the D.C. Circuit issued an opinion (the "*MasTec* Enforcement Opinion") enforcing the NLRB Order.[8] ECF No. 33-4 at 2 (Fact No. 3); *see also DirecTV*, 837 F.3d at 46. The court, on its own motion, ordered the mandate withheld "until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc." *MasTec Advanced Techs.*, No. 11-1274 (D.C. Cir. Sept. 16, 2016) (order withholding mandate). MasTec timely filed a petition for rehearing *en banc*. MasTec's Petition for Rehearing En Banc, *MasTec Advanced Techs.*, No. 11-1274 (D.C. Cir. Nov. 14, 2016). On February 10, 2017, the *en banc* court denied MasTec's

[6] Directives addressed to MasTec were included in Section A of the NLRB Order, with the "affirmative actions" to be taken by MasTec included in a number of lettered sub-paragraphs of Paragraph 2 in Section A. Hereinafter, the relevant directives regarding such affirmative actions will be cited as "Paragraph 2(a)," "Paragraph 2(c)," "Paragraph 2(d)," etc. The NLRB also required DirecTV to perform certain remedial acts, which were included in Section B of the NLRB Order, but those are irrelevant to this dispute.

[7] This Report and Recommendation cites documents from Case No. 11-1274, which is the case that MasTec filed, although the filings are the same in both cases.

[8] The NLRB "differs from the majority of administrative agencies in that it does not possess authority itself to exact obedience to its own orders," *Ardizzoni v. NLRB*, 663 F.2d 130, 132 (D.C. Cir. 1980) (per curiam); that is, the NLRB's orders are not "self-executing," *NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 890 (7th Cir. 1990). Although "it is only the court's order, enforcing the [NLRB's] order, that binds," *Blankenship & Assocs., Inc. v. NLRB*, 54 F.3d 447, 449 (7th Cir. 1995), this Report and Recommendation refers to the enforceable order as the "NLRB Order" throughout, merely for ease of reference.

Additionally, although the caption on the D.C. Circuit's opinion enforcing the NLRB Order is *DirecTV, Inc. v. NLRB*, because this contempt motion concerns only MasTec, whose case *MasTec Advanced Technologies v. NLRB* was consolidated with the *DirecTV* case, when referring to the D.C. Circuit's merits decision in the text of this Report and Recommendation (rather than in the citations), the undersigned will denominate it the *MasTec* Enforcement Opinion.

petition. *MasTec Advanced Techs.*, No. 11-1274 (D.C. Cir. Feb. 10, 2017) (order denying MasTec's *en banc* petition). The mandate issued on February 22, 2017. *MasTec Advanced Techs.*, No. 11-1274 (D.C. Cir. Feb. 10, 2017) (mandate).

On May 16, 2017, MasTec filed a petition for writ of certiorari in the Supreme Court. Petition for Writ of Certiorari, *MasTec Advanced Techs. v. NLRB*, 138 S. Ct. 92 (May 16, 2017) (No. 16-1370). The company thereafter filed two motions in the D.C. Circuit: first a motion to stay the mandate and then a motion to recall the mandate. Motion for Stay of Mandate Pending Filing of Petition for Writ of Certiorari, *Mastec Advanced Techs.*, No. 11-1274 (D.C. Cir. May 31, 2017) [hereinafter, Motion for Stay];[9] Motion to Recall Mandate due to Filing of Petition for Writ of Certiorari, *Mastec Advanced Techs.*, No. 11-1274 (D.C. Cir. June 12, 2017) [hereinafter, Motion to Recall]. The Motion for Stay was denied on June 14, 2017, and the Motion to Recall was denied on July 7, 2017. *Mastec Advanced Techs.*, No. 11-1274 (D.C. Cir. June 14, 2017) (order denying motion for stay); *Mastec Advanced Techs.*, No. 11-1274 (D.C. Cir. July 7, 2017) (order denying motion to recall). The Supreme Court denied *certiorari* on October 2, 2017. *Mastec Advanced Techs.*, 138 S. Ct. 92 (2017).

2. Proceedings Before the U.S. District Court for the Middle District of Florida between May 2018 and May 2019

As discussed more fully below, while proceedings were ongoing in the D.C. Circuit and the Supreme Court, the NLRB had repeatedly (and unsuccessfully) sought records from MasTec to enable the agency to calculate the back pay owed to the illegally-discharged employees. *See* Section II.B.3, *infra*. Thereafter, on February 21, 2018, it served an administrative subpoena for

[9] Although the motion's title indicates that it was submitted prior to the filing of a petition for writ of certiorari, by the time MasTec sought the stay, the petition for writ of certiorari had already been filed. *See* Motion for Stay at 3.

records on the company.[10] ECF No. 33-4 at 4–5 (Fact No. 7), 15 (Fact No. 33), 19 (Fact No. 46). On May 17, 2018, the NLRB applied to the U.S. District Court for the Middle District of Florida to enforce the subpoena. *Id.* at 6 (Fact No. 9). That court enforced the subpoena on August 10, 2018. *Id.* (Fact No. 10); *see also* ECF No. 26-24 at 2–3 (M.D. Fla. Order). On November 9, 2018, alleging that MasTec had failed to comply with the subpoena even after the enforcement order, the NLRB filed a motion requesting that the court hold MasTec in civil contempt. ECF No. 33-4 at 6 (Fact No. 11); *see also* ECF No. 26-24 at 3. Noting that MasTec had filed a certificate of compliance with the court while the contempt motion was pending, on April 19, 2019, the Middle District of Florida denied the NLRB's contempt motion without prejudice and with leave to renew the motion within 30 days. ECF No. 26-24 at 4–5. The subpoena enforcement proceeding was closed on May 22, 2019. ECF No. 33-4 at 7 (Fact No. 14).

3. Proceedings in the D.C. Circuit Since the Filing of the Contempt Petition in November 2019

Approximately six months after the subpoena enforcement proceeding in the Middle District was closed, on November 19, 2019, the NLRB filed the Contempt Petition in the D.C. Circuit seeking to hold MasTec in civil contempt for failure to comply with the *MasTec* Enforcement Opinion affirming the NLRB Order. Contempt Petition, *Mastec Advanced Techs.*, No. 11-1274 (D.C. Cir. Nov. 19, 2019); *see also* ECF No. 2. Specifically, the Contempt Petition alleges that MasTec has failed to comply with the following provisions of the NLRB Order (as affirmed by the D.C. Circuit) in the following ways:

[10] In its response to the NLRB's statement of undisputed material facts, MasTec states that it "dispute[s], at least in part if not in whole," the assertion that the NLRB issued the subpoena after MasTec had failed to respond to numerous requests to produce documents. ECF No. 33-4 at 5 (Fact No. 8). However, MasTec's response does not actually dispute the accuracy of the NLRB's representation, but merely provides an explanation for its failure to produce the records. *See id.* More, MasTec admitted in its responses to the NLRB's RFAs that it had failed repeatedly to produce the records requested. ECF No. 26-8 at 7–8 (RFA Nos. 25, 29–30, 32).

(1) Paragraph 2(a), by failing to timely offer reinstatement to three of the illegally-discharged employees—Hugh Fowler, Joseph Guest, and Delroy Harrison—and instead waiting until March 1, 2019 to make such offers (ECF No. 2 at 7);

(2) Paragraph 2(c), by failing to timely expunge references to the illegal discharges from those employees' records and to inform those employees of the expungement, instead waiting until May 1, 2018, to remove such references and until March 1, 2019, to notify the employees of that removal (*id.* at 7–8);

(3) Paragraph 2(f), by failing to promptly rescind and notify employees of the rescission of certain policies, instead waiting until March 1, 2019, to complete the task (*id.*at 8);

(4) Paragraph 2(d), by failing to timely provide, upon the NLRB's repeated requests, a subpoena, and a contempt proceeding in the Middle District of Florida, copies of documents—payroll records and records related to reinstatement offers, 401(k) contributions, and discounted TV services offered as a benefit to the illegally-discharged employees—necessary for the NLRB to calculate the amount of back pay owed the illegally-discharged employees (*id.* at 8–13);

(5) Paragraph 2(g), by failing to timely post and electronically distribute copies of the notices included in Appendices A, B, and C of the NLRB Order ("Notice A," "Notice B," and "Notice C") and to certify that it had done so, instead waiting until early March 2019 to post, electronically distribute, and certify the posting of the notices, one of which—Notice C—was allegedly deficient because it was unsigned by a representative of DirecTV (*id.* at 13–16); and

(6) Paragraph 2(h), by failing to timely return a completed form certifying the steps it had taken to comply with the NLRB Order, instead waiting until March 8, 2019, to return a completed certification form (*id.* at 17).

As a remedy for the alleged contempt, the NLRB seeks an order requiring MasTec to provide the agency with all outstanding requested records; post in the Orlando facility and electronically distribute to its employees a copy of Notice C signed by a representative of DirecTV; post and distribute to employees a copy of the contempt adjudication as well as a new notice (to be provided by the NLRB) stating that MasTec has been held in contempt and describing the actions it will undertake to purge that contempt; permit an agent of the NLRB access to MasTec facilities

during regular business hours to verify that MasTec had posted the required notices; distribute to all MasTec officers, managers, and supervisors nationwide a copy of the contempt adjudication and require each of them to acknowledge receipt of that document in writing; file a sworn certification detailing the steps MasTec has taken to comply with those directives; and pay the NLRB's costs and expenses, including attorney's fees, associated with the contempt proceeding. *Id.* at 18–22. In addition, the NLRB requests that the D.C. Circuit issue an order imposing prospective fines against MasTec to guard against future violations of the NLRB Order (as enforced by the D.C. Circuit) and the contempt adjudication that the NLRB seeks here: $100,000 for each future violation of either of those orders, plus an additional fine of $2,500 per day for each day that violation continues to be assessed against MasTec, as well as a separate prospective fine of $1,000 for each future violation and $100 per day for each day that violation continues to be assessed against any of MasTec's officers, agents, or representatives who act in concert with MasTec to violate the NLRB Order or D.C. Circuit contempt adjudication. *Id.* at 22. The NLRB did not seek fines for past violations of the NLRB Order.

The D.C. Circuit ordered MasTec to file a sworn answer to the Contempt Petition and to show cause why it should not be held in civil contempt. *Mastec Advanced Techs.*, No. 11-1274 (D.C. Cir. Dec. 9, 2019) (order directing MasTec to file answer and show cause why Contempt Petition should not be enforced). MasTec responded, arguing that it should not be held in contempt for various reasons, among them that it sought reconsideration of the D.C. Circuit's *MasTec* Enforcement Opinion and also sought review in the Supreme Court; that it has provided to the NLRB documents that it requested, including documents MasTec was ordered to produce by the Middle District of Florida in response to the subpoena and documents the NLRB has requested since the resolution of that matter; and that factual disputes as to MasTec's compliance militated against a

finding of contempt without further development of the factual record. Respondent's Submission to Show Cause, *Mastec Advanced Techs.*, No. 11-1274 (D.C. Cir. Jan. 8, 2020); *see also* ECF No. 3 at 6–9. On April 9, 2020, the D.C. appointed the undersigned as Special Master to develop the record and ultimately recommend a disposition of the Contempt Petition. *Mastec Advanced Techs.*, No. 11-1274 (D.C. Cir. Apr. 9, 2020) (order granting motion for reference to special master); *see also* ECF No. 1.

After discovery, the NLRB filed a motion for summary judgment. ECF No. 26. It seeks a recommendation from the undersigned to hold MasTec in contempt as well as the remedies outlined in the Contempt Petition, but focuses particularly on the following remedies: an award of the costs and attorney's fees it has incurred in "investigating, preparing and presenting the matters involved in these [civil contempt] proceedings," *W. Tex. Utilities Co. v. NLRB*, 206 F.2d 442, 448–49 (D.C. Cir. 1953); and imposition of a set of prospective fines "sufficient to ensure MasTec's compliance with its ongoing obligations under the [NLRB Order]." ECF No. 26-2 at 23, 25.

B. MasTec's Attempted Compliance with the NLRB Order

To recall a few relevant dates, the NLRB issued its decision on July 21, 2011. MasTec filed its petition for review of the NLRB's decision in the D.C. Circuit on August 3, 2011. The D.C. Circuit issued its opinion affirming NLRB Order on September 16, 2016. The mandate issued on February 22, 2017. The Supreme Court denied *cert.* on October 2, 2017. The NLRB filed the Contempt Petition on November 19, 2019.

1. Paragraph 2(a)—Reinstatement Offer Letters

Paragraph 2(a) of the NLRB Order gave MasTec fourteen days to offer reinstatement to the 26 illegally-discharged employees. ECF No. 33-4 at 3 (Fact No. 4). On January 23, 2013, and April 11, 2014, while MasTec's petition for review was pending in the D.C. Circuit, MasTec sent

written offers of reinstatement to some of the employees named in the NLRB Order; between the two batches of letters, 23 of the 26 employees named in the NLRB Order had received reinstatement offer letters by mid-April 2014. ECF No. 34 at 3–4 (Fact Nos. 5, 8).

On March 1, 2019—almost two and one-half years from the date of the D.C. Circuit's *MasTec* Enforcement Opinion, more than two years after the D.C. Circuit's mandate affirming the NLRB Order, and seventeen months after the Supreme Court denied *cert.*—MasTec made offers of reinstatement to the three remaining employees. ECF No. 33-4 at 9–10 (Fact Nos. 18–23).

2. Paragraph 2(c)—Removal of References to Discharges from Records and Notice to Discharged Employees of the Removal

Paragraph 2(c) of the NLRB Order gave MasTec fourteen days to remove all references to the unlawful discharges from its files and then, within three days, to inform the illegally-discharged employees in writing that the records had been expunged and that the discharges would not be used against them. ECF No. 33-4 at 3 (Fact No. 4).

On May 1, 2018—more than one and one-half years from the date of the D.C. Circuit's *MasTec* Enforcement Opinion, approximately fourteen months after the D.C. Circuit's mandate affirming the NLRB Order, and seven months after the Supreme Court denied *cert.*—MasTec removed references of the illegal discharges from its records.[11] ECF No. 33-4 at 11 (Fact No. 25). MasTec did not inform the illegally-discharged employees in writing within three days that the records had been expunged or that the discharges would not be used against them. *Compare* ECF

[11] MasTec asserts that it removed the references "[i]n May 2018 (or perhaps before)." ECF No. 34 at 6 (Fact No. 13). The company has admitted—thrice—that the references were not removed before May 1, 2018. It did so first in an affidavit dated March 7, 2019, that was provided to the Court in support of MasTec's response to the NLRB's statement of undisputed material facts. *See* ECF No. 33-7 at 7 (Paragraph 6(a), asserting, under oath, that "the date that references to unlawful discharges were removed was in May 2018, although the specific day in May is uncertain"). It did so again in its October 5, 2020 supplemental responses to the NLRB's RFAs. *See* ECF No. 26-9 at 4 (RFA No. 12). It did so yet again in its response to the NLRB's statement of undisputed material facts. *See* ECF No. 33-4 at 11 (Fact No. 25).

No. 2 at 8 (Contempt Petition, ¶ 23), *with* ECF No. 3 at 16 (MasTec's answer, ¶ 23).[12] Indeed, it did not provide such written notice until March 2019. ECF No. 2 at 8 (Contempt Petition, ¶ 24); ECF No. 3 at 16–17 (MasTec's answer, ¶ 24).[13]

3. Paragraph 2(d)—Compliance with Requests for Documents

Paragraph 2(d) of the NLRB Order required MasTec to preserve records necessary for the NLRB to analyze the amount of back pay due to the illegally-discharged employees under the order and, upon a request by the NLRB, to provide those records to the agency within fourteen days (or within the time approved by the Regional Director). ECF No. 33-4 at 3 (Fact No. 4).

On October 27, 2016, just over one month after the D.C. Circuit issued its opinion affirming the NLRB Order but before the mandate had been issued, the NLRB requested that MasTec produce (within three weeks) copies of the reinstatement offer letters in order to allow the agency to analyze and calculate the amount of back pay owed to the terminated employees. ECF No. 33-4 at 15 (Fact Nos. 33–34). On March 2, 2017—about one week after the mandate issued—the NLRB repeated its request for MasTec to produce copies of the reinstatement offer letters it had issued within three weeks. *Id.* at 16 (Fact No. 35). On April 5, 2017, the NLRB requested that MasTec produce by April 19, 2017, certain payroll records necessary to the calculation of back pay. *Id.* at 18–19 (Fact No. 43). On January 19, 2018, three and one-half months after the Supreme Court

[12] MasTec asserts that this fact is disputed. ECF No. 33-4 at 11–12 (Fact No. 26). However, it admitted the fact in its answer to the Contempt Petition. *Compare* ECF No. 2 at 8 (Contempt Petition, ¶ 23), *with* ECF No. 3 at 16 (MasTec's answer, ¶ 23); *see, e.g.*, *Mo. Housing Dev. Comm'n*, 919 F.2d at 1314 (8th Cir. 1990) (noting that admissions in pleadings are binding on the party that made them); *Davis*, 823 F.2d at 107–08 (same).

[13] MasTec attempts to dispute this fact, but the evidence to which it points—an affidavit from its Director of Payroll—does not undercut the NLRB's assertion. That affidavit merely states that (1) MasTec provided a draft version of the notice to the NLRB at some point, but, "after a thorough search, the [c]ompany was unable to locate any documentation confirming when or how that notice was provided" to the illegally-discharged employees; and (2) that letters sent to those individuals prior to March 1, 2019, "*may have existed* at some point," but were no longer in the company's files. ECF No. 33-7 at 7 (emphasis added). Those representations do not create a genuine issue of material fact.

denied MasTec's petition for a writ of *certiorari*, the NLRB sought production by February 19, 2018, of (1) all reinstatement offer letters, (2) proof of their issuance, and (3) copies of the payroll records requested on April 5, 2017.[14] *Id.* at 16 (Fact No. 36), 18 (Fact No. 43). MasTec failed to timely comply with any of those requests. ECF No. 26-8 at 7 (RFA No. 25, admitting that MasTec did not provide the NLRB with copies of reinstatement offer letters within the time periods demanded in the October 27, 2016, March 2, 2017, April 5, 2017, or January 19, 2018 letters); *id.* at 8 (RFA No. 30, admitting that MasTec did not provide the NLRB with payroll records within the time periods demanded in the October 27, 2016, March 2, 2017, April 5, 2017, or January 19, 2018 letters); ECF No. 33-4 at 18 (Fact No. 42, admitting that MasTec did not produce to the NLRB proof of the issuance of reinstatement offer letters within the time periods demanded in the October 27, 2016, March 2, 2017, April 5, 2017, or January 19, 2018 letters).

On February 21, 2018, the NLRB issued an administrative subpoena that required MasTec to produce copies of the reinstatement offer letters MasTec had sent with proof of their issuance and payroll records necessary to calculate the amount of back pay due to the 26 illegally-discharged employees. ECF No. 33-4 at 4–5 (Fact No. 7), 15–16 (Fact Nos. 33, 37); 19 (Fact Nos. 45–46). MasTec responded on March 7, 2018—the date of compliance identified in the subpoena—by producing copies of reinstatement offer letters to 16 of the 26 employees named in the NLRB Order. *Id.* at 16–17 (Fact Nos. 37, 39). Prior to that date, MasTec had not provided copies of any such offer letters to the NLRB. *Id.* at 17 (Fact No. 38).[15] MasTec's March 7, 2018 response

[14] In its response to the NLRB's statement of undisputed material facts, MasTec asserts that it is "uncertain of the dates" on which each of the referenced communication was sent. ECF No. 33-4 at 15–16 (Fact Nos. 34–36), 18–19 (Facts Nos. 43–44). However, in its answer to the NLRB's Contempt Petition, it admitted that the dates the NLRB provides here are accurate. *Compare* ECF No. 2 at 9–11 (Contempt Petition, ¶¶ 28, 30, 32, 38), *with* ECF No. 3 at 17–18 (MasTec's answer, ¶¶ 28, 30, 32, 38).

[15] Again, MasTec states that it is unsure of the date on which it first provided the documents. ECF No. 33-4 at 17 (Fact No. 38). In its own statement of additional facts, it asserts that "documentation of those offer letters [was] provided to the [NLRB] prior to the entry of the [D.C Circuit's] September 16, 2016 Order." ECF No. 34 at 4 (Fact

to the subpoena failed to include proof that the reinstatement offer letters had been issued or any of the requested payroll records, nor had MasTec provided such information to the NLRB prior to that date. *Id.* at 18 (Fact No. 42), 20 (Fact No. 48); *see also* ECF No. 26-8 at 8 (RFA Nos. 29–30).

In light of such failures, the NLRB sought enforcement of the subpoena from the U.S. District Court for the Middle District of Florida in May 2018. ECF No. 33-4 at 6 (Fact No. 9). On August 10, 2018, that court ordered MasTec to comply with the subpoena by September 24, 2018. *Id.* (Fact No. 10). On September 4, 2018, MasTec provided some, but not all of the payroll records requested in the subpoena. ECF No. 26-8 at 8 (RFA No. 29).[16]

On November 9, 2018, alleging that MasTec had failed to fully comply with the subpoena, the NLRB filed a motion in the Middle District of Florida to hold MasTec in contempt. ECF No. 33-4 at 6 (Fact No. 11). After holding an evidentiary hearing, the court issued an order denying the NLRB's motion without prejudice. *Id.* at 6–7 (Fact No. 12); ECF No. 26-24 (M.D. Fla. order on motion for contempt). In that order, dated April 19, 2019, the court noted that, although MasTec had conceded at the evidentiary hearing that it had not complied fully with the subpoena, asserting that the passage of time had made it difficult to locate some documents, the company had subsequently filed a certificate on April 5, 2019, stating that it had fulfilled its obligations to produce documents pursuant to the subpoena. ECF No. 26-24 at 2, 4. In light of the "significant change in circumstances," the court denied the motion for contempt without prejudice, giving the NLRB until May 20, 2019, to renew it. ECF No. 26-24 at 5. The court also noted that it was not addressing "any alleged contempt in relation to the underlying case before the [D.C. Circuit]," as the

No. 7). However, not only does the evidence MasTec cites in support of this assertion fail even to suggest that such proof was provided prior to that date (ECF No. 33-7 at 3 (¶ 3(a))), the assertion contradicts MasTec's own admission that, prior to March 7, 2018, it had not provided copies of any reinstatement offer letters to the NLRB (ECF No. 26-8 at 7 (RFA No. 25)).

[16] Again, MasTec attempts to deny a fact that it has already admitted. *See* ECF No. 33-4 at 20 (Fact No. 47).

Middle District of Florida was not the appropriate forum for such relief. *Id.* at 4. The NLRB did not renew its motion for contempt and the court closed the subpoena enforcement proceeding on May 22, 2019. ECF No. 33-4 at 7 (Fact No. 14).

It is undisputed that MasTec made a "voluminous" production on March 8, 2019, during the pendency of those contempt proceedings. ECF No. 26-24 at 4. That production included the remaining payroll records sought by the subpoena that had not been produced on September 4, 2018; three of the remaining ten reinstatement offer letters; and proof of issuance of the reinstatement offer letters that had been sent. ECF No. 33-4 at 17–18 (Fact Nos. 40–41), 20–21 (Fact Nos. 49–50); *see also* ECF No. 26-8 at 8 (RFA No. 31). Along with that production, MasTec also asserted that the other seven reinstatement offer letters could not be found and supplied an explanation regarding additional responsive records that were not in MasTec's possession. ECF No. 33-4 at 17–18 (Fact Nos. 40–41). To recap, MasTec first provided the NLRB with (1) copies of reinstatement offers on March 7, 2018 (ECF No. 26-8 at 7 (RFA No. 25)); (2) payroll records on September 4, 2018 (*id.* at 8 (RFA No. 30)); and (3) proof of the issuance of reinstatement letters on March 8, 2019 (ECF No. 33-4 at 18 (Fact Nos. 41–42)).

Beginning approximately two months after the close of subpoena enforcement proceeding in May 2019, the NLRB requested in writing that MasTec provide additional records necessary for it to analyze the amount of back pay due to the illegally-discharged employees. ECF No. 33-4 at 22 (Facts Nos. 54–55). Specifically, the NLRB requested on July 11, 2019, that MasTec provide records related to any reinstatement offers issued after May 22, 2019, and records related to MasTec's employment of individuals with criminal records; on July 29, 2019, that the company provide records relating to discounted TV services offered as a benefit to the illegally-discharged

employees; and on September 3, 2019, that it provide records regarding MasTec's 401(k) contributions. *Id.* at 21–22 (Fact Nos. 51–53).[17] The NLRB reiterated those requests in writing on October 11, 2019. *Id.* at 22 (Fact No. 54).[18] It is undisputed that MasTec did not produce to the NLRB records related to the discounted TV services, 401(k) contributions, or employment of individuals with criminal records until after the agency filed its Contempt Petition in the D.C. Circuit on November 19, 2019. *Id.* at 22–24 (Fact Nos. 56–59).[19]

4. Paragraphs 2(e) & (f)—Rescission of Confidentiality, Solicitation, and Distribution Rules and Notice to Employees

Paragraph 2(e) of the NLRB Order required MasTec to rescind the confidentiality, solicitation, and distribution rules in the employee handbook distributed in 2006 that the NLRB found violative of the NLRA. ECF No. 33-4 at 3 (Fact No. 4). Paragraph 2(f) required MasTec to inform all its employees who received that handbook that the rules had been rescinded and were no longer enforced. *Id.*

[17] MasTec's new assertion that it is unsure whether the July 29, 2019, and September 3, 2019 dates are accurate is foreclosed by its admission in its answer to the Contempt Petition. *Compare* ECF No. 2 at 12 (Contempt Petition, ¶¶ 48–49), *with* ECF No. 3 at 19–20 (MasTec's answer, ¶¶ 48–49).

[18] MasTec's professed uncertainly about dates is again foreclosed by prior admissions, both in its answer to the Contempt Petition and in its responses to the NLRB's RFAs. *Compare* ECF No. 2 at 13 (Contempt Petition, ¶ 51), *with* ECF No. 3 at 20 (MasTec's answer, ¶ 51); ECF No. 26-8 at 9 (RFA No. 33).

[19] MasTec tries but fails to create a dispute as to these facts. It has admitted in its responses to the NLRB's RFAs that it did not provide records related to discounted TV service, 401(k) contributions, and the employment of individuals with criminal backgrounds until after the filing of the Petition. ECF No. 26-8 at 9–10 (RFA Nos. 36–41). In its response to the NLRB's statement of undisputed material facts, MasTec asserts—contrary to its admissions—that these facts are disputed, explaining that its counsel "corresponded" with an NLRB compliance officer about discounted TV service and 401(k) participation of its counsel and asserts that it produced records regarding 401(k) contributions prior to November 19, 2019. ECF No. 33-4 at 22–23 (Fact No. 56). Its evidence is an affidavit from its counsel and a series of emails, both submitted along with its opposition to the NLRB's motion for summary judgment. *Id.* As discussed, such late-breaking evidence cannot create a genuine issue of material fact as to issues MasTec has already admitted. Moreover, the emails to which MasTec's counsel points to support the assertion that MasTec provided the requested records to the NLRB prior to November 19, 2019, merely reflect communications between counsel and the compliance officer. None represents that *records* responsive to the requests at issue had been produced prior to November 19, 2019. *See generally* ECF No. 33-9.

It is undisputed that the confidentiality policy, which prohibited employees from revealing employee names or compensation, had been rescinded prior to the issuance of the NLRB Order. ECF No. 34 at 8 (Fact No. 16). The record is not clear as to when the other offending policies were rescinded, but the NLRB asserts that they were rescinded in 2007 and makes no claim that the timing or manner of the rescission violated the NLRB Order. ECF No. 26-2 at 18.

Between March 1 and March 4, 2019—almost two and one-half years after the D.C. Circuit issued its opinion, approximately two years after the D.C. Circuit's mandate affirming the NLRB Order and seventeen months after the Supreme Court denied *cert.*—MasTec sent letters to the last known addresses of 5,609 current and former employees notifying them of the rescission of the illegal policies and rules from the 2006 employee handbook. ECF No. 34 at 8–9 (Fact Nos. 17–18). MasTec also provided the NLRB with a list of those employees, which it claims includes all of the employees who received the 2006 handbook, and a file including the 5,609 letters that were mailed. *Id.* at 9 (Fact No. 19).

5. Paragraph 2(g)—Posting and Distributing Notices A, B, and C

Paragraph 2(g) of the NLRB Order required MasTec to post at its Orlando facility copies of Notices A and C and post at its other facilities nationwide copies of Notice B. ECF No. 33-4 at 3 (Fact No. 4). The notices—on forms to be provided by the Regional Director—were to be signed by a representative of both MasTec and DirecTV, posted within 14 days, and maintained for 60 days. *Id.* at 3–4 (Fact No. 4). Additionally, because MasTec customarily communicated with its employees electronically, it was required to distribute the notices electronically. *Id.* at 4 (Fact No. 4), 24 (Fact No. 60).

As to Notices A and B, the NLRB sent MasTec copies of them, along with posting certification forms, on October 27, 2016—a date between the issuance of the D.C. Circuit's opinion on

September 16, 2016, and the issuance of the mandate on February 22, 2017. *Id.* at 24–25 (Fact No. 61), 27 (Fact No. 69). On March 2, 2017, eight days after the issuance of the mandate, the NLRB again sent copies of Notices A and B along with posting certification forms to MasTec. *Id.* at 25 (Fact No. 62), 27 (Fact No. 70). The NLRB did so again on February 21, 2018. *Id.* (Fact Nos. 63, 71). MasTec did not post Notice A at its Orlando facility until March 1, 2019, more than two years after the D.C. Circuit's mandate issued and nearly five months after the Supreme Court denied *cert*. *Id.* at 26 (Fact No. 67). MasTec did not physically post a copy of Notice B at its other facilities nationwide until between March 1 and March 4, 2019. *Id.* at 27 (Fact No. 72). The company first electronically distributed Notices A and B to its employees on March 1, 2019. *Id.* at 26 (Fact No. 68), 28 (Fact No. 73). It returned to the NLRB the certification forms for Notices A and B on March 8, 2019. *Id.* at 25 (Fact No. 64), 28 (Fact No. 74).

As to Notice C, the NLRB sent MasTec copies of the document, signed by a representative of DirecTV, along with a posting certification form, on February 21, 2018. *Id.* at 28–29 (Fact No. 76). MasTec received a digital copy of Notice C, signed by a representative of DirecTV, and a posting certification form, on February 22, 2018. *Id.* at 29 (Fact No. 77). On March 1, 2019, MasTec first posted a copy of Notice C at its Orlando facility and first distributed the notice to employees electronically. *Id.* at 29–30 (Fact Nos. 78, 80). On March 8, 2019, MasTec provided the NLRB with email confirmation that Notice C had been posted at the Orlando premises. ECF No. 34 at 11 (Fact No. 26). However, neither the copy of Notice C posted nor the electronically distributed version were signed by a representative of DirecTV. ECF No. 33-4 at 29–30 (Fact Nos. 79, 81). As of the date of the filing of the motion for summary judgment, MasTec had neither posted nor electronically distributed a properly signed version of Notice C. *Id.* at 31 (Fact Nos.

83–84). MasTec has represented that it is "willing[ ] to correct this technical issue and repost Notice C bearing the proper signature." *Id.*

6. Paragraph 2(h)—Sworn Certification of Compliance

Paragraph 2(h) of the NLRB Order required MasTec to file with the Regional Director of the NLRB a sworn certification of its compliance efforts within 21 days of the date the NLRB provided the company with the certification form. *Id.* at 4 (Fact No. 4).

The NLRB's Regional Director provided a certification form to MasTec on October 27, 2016 (after the D.C. Circuit's opinion, but prior to issuance of the mandate); again on March 2, 2017 (after issuance of the mandate); and again on February 21, 2018 (after the Supreme Court's denial of *cert.*). *Id.* at 32 (Fact Nos. 85–87). MasTec first returned a completed compliance certification on March 8, 2019, almost two and one-half years after the D.C. Circuit issued its opinion, approximately two years after the D.C. Circuit's mandate affirming the NLRB Order and seventeen months after the Supreme Court denied *cert*. *Id.* at 33 (Fact No. 89).

III. CONCLUSIONS OF LAW

A. *Prima Facie* Showing

As noted above, the party seeking a finding of civil contempt must make a *prima facie* showing that (1) a clear and unambiguous court order was in effect, (2) the order required certain conduct by the putative contemnor, and (3) the putative contemnor failed to comply with the Court's orders. *See Bilzerian*, 112 F. Supp. 2d at 16.

The first two requirements are met here. The D.C. Circuit issued its merits opinion in this case on September 16, 2016, and the mandate issued on February 22, 2017.[20] The D.C. Circuit

[20] The NLRB indicates throughout its motion that the operative date by which to measure MasTec's compliance with the NLRB Order is September 16, 2016, the date of the *MasTec* Enforcement Opinion. *See, e.g.*, ECF No. 26-2 at 11–13, 18 (measuring the time for MasTec's compliance with Paragraphs 2(a), (c), and (f) from September 16, 2016). That appears to be the NLRB's official position in all cases: according to the NLRB Casehandling Manual, "The

enforced the NLRB Order in its entirety. *See DirecTV*, 837 F.3d at 46. As MasTec admits, the NLRB Order required the company to "take the . . . affirmative action[s]" listed in Paragraphs 2(a) through (h), which include the tasks relevant here. ECF No. 33 at 3. Thus, "[i]t is clear and uncontested that the [NLRB Order as enforced by the D.C. Circuit] constitutes an unambiguous court order that required certain specified conduct by [MasTec]." *Latney's Funeral Home*, 41 F. Supp. 3d at 31; *cf. Trade Exch. Network*, 117 F. Supp. 3d at 26–27 (holding that an order was clear and unambiguous where it separately set out each of the actions required "to the best of the Court's knowledge").

The NLRB has also shown by undisputed clear and convincing evidence that MasTec failed to comply with the NLRB Order. MasTec does not claim that it timely performed the affirmative actions required by five of the six relevant subparagraphs in the NLRB Order (Paragraphs 2(a), 2(c), 2(d), 2(g), and 2(h)). To summarize:

Compliance Officer should begin compliance efforts immediately upon entry of the judgment." NLRB Casehandling Manual, Part 3, Compliance Proceedings, Section 10506.9 (Oct. 2020), https://www.nlrb.gov/sites/default/files/attachments/pages/node-174/compliance-manual-october-2020.pdf (last visited June 1, 2021). There is an argument, however, that MasTec's obligation to comply with the NLRB Order did not ripen until the mandate issued on February 22, 2017. *See* Fed. R. App. P. 41(c) & advisory committee's notes to 1998 amendments (noting that "[t]he mandate is effective when issued" and that, prior to its issuance, "[a] court of appeals' judgment or order is not final" and the parties' obligations are not yet fixed); *see also, e.g.*, *Nat. Res. Def. Council v. Cty. of L.A.*, 725 F.3d 1194, 1203 (9th Cir, 2013) (noting that "a 'court of appeals may modify or revoke its judgment at any time prior to the issuance of the mandate, sua sponte or by motion of the parties'" (quoting *United States v. Foumai*, 910 F.2d 617, 620 (9th Cir, 1990))); *GPX Int'l Tire Corp. v. United States*, 678 F.3d 1308, 1312 (Fed. Cir. 2012) ("An appellate court's decision is not final until its mandate issues." (quoting *Beardslee v. Brown*, 393 F.3d 899, 901 (9th Cir, 2004))); *United States v. Philip Morris*, 778 F. Supp. 2d 8, 12 (D.D.C. 2011) (measuring the time period for which a party would be subject to certain provisions of a court's injunction from the date the D.C. Circuit's mandate affirming those provisions); *cf., e.g.*, 16AA Catherine T. Struve, *Federal Practice and Procedure* § 3987 & n.18 (5th ed.) (noting that, where a petition for rehearing stays the issuance of the mandate, "the case is 'pending' in the court of appeals, with sometimes significant consequences"). Such an argument is perhaps strengthened by the fact that the D.C. Circuit affirmatively withheld issuance of the mandate "until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc." *MasTec Advanced Techs.*, No. 11-1274 (D.C. Cir. Sept. 16, 2016) (order withholding mandate). However, MasTec does not raise that point and, as the discussion below should make clear, MasTec's attempts to comply with the order were so dilatory that the five-month period of time between issuance of the opinion and issuance of the mandate does not make a material difference to the analysis here. Still, given the fact that the NLRB's position may conflict with the case law and treatise cited above, it may be prudent for the Court to clarify that issue so as to avoid any possible confusion going forward in this contempt matter or in others.

1. Paragraph 2(a) required MasTec to offer reinstatement to the 26 illegally-discharged employees within 14 days from the date the order became enforceable. As discussed in Section III.B.1, *supra*, although MasTec accomplished that task as to some of those individuals while its petition for review was pending in the D.C. Circuit (and thus before the D.C. Circuit enforced the NLRB Order), it did not send such offers to 3 of those former employees until March 2019, years after the *MasTec* Enforcement Opinion and years after the mandate issued.

2. Paragraph 2(c) required MasTec to remove all references to the unlawful discharges from its files within 14 days of when the order became enforceable and then, within 3 additional days, to inform the illegally-discharged employees in writing of that the records had been expunged and that the discharges would not be used against them. As discussed in Section III.B.2, *supra*, MasTec did not purge its records of references to the discharges until May 2018, more than a year after the *MasTec* Enforcement Opinion and more than a year after the mandate issued. It did not provide written notice to those individuals until 10 months after that.

3. Paragraph 2(d) required MasTec to timely produce records requested by the NLRB. As discussed in Section III.B.3, *supra*, MasTec repeatedly failed to comply with the NLRB's requests for documents, even after issuance of a subpoena, an order of enforcement by the Middle District of Florida, and the institution of a contempt proceeding in that district. The company fully complied with the subpoena (which sought some of the same documents the NLRB requested in October 2016, March and April 2017, and January 2018) in March 2019, more than a year after the subpoena was issued and while those contempt proceedings were pending. Subsequent requests for documents were not complied with until after this Contempt Petition was filed in the D.C. Circuit.

4. Paragraph 2(g) required MasTec to post certain notices within 14 days of receiving them from the Regional Director and also to distribute those notices electronically. As discussed in Section III.B.5, *supra*, MasTec neither posted Notices A and B nor electronically distributed them until March 2019, years after it received copies from the NLRB, years after the *MasTec* Enforcement Opinion, and years after the mandate issued. Notice C was also posted and distributed in March 2019, more than a year after the NLRB provided the company with copies (which occurred approximately one year after the mandate issued); moreover, the notice that MasTec posted and distributed was deficient. Additionally, although MasTec is aware of the deficiency and in possession of a compliant notice, the company has presented no evidence that it has since corrected the error.

5. Paragraph 2(h) required MasTec to file, on a form provided by the Regional Director, a sworn certification of its compliance efforts within 21 days. As

> discussed in Section III.B.6, *supra*, MasTec did not return the certification until March 2019, despite having been provided the form in October 2016, March 2017, and February 2018.

Indeed, MasTec admits that it violated those provisions of the NLRB Order with "tardy" action (ECF No. 33 at 6), which is a charitable way to characterize the company's lengthy delinquency.

As to Paragraph 2(f)—which required MasTec to inform employees who received the 2006 employee handbook that included the illegal confidentiality, solicitation, and distribution rules or policies that those rules or policies had been rescinded—the company suggests that, because the obligation did not include a deadline, it was in full compliance when, in March 2019, it informed the employees it believes received the 2006 employee handbook of the rescission. ECF No. 33 at 5. As noted in Section II.B.4, *supra*, that notice was provided years after the *MasTec* Enforcement Opinion and years after the mandate issued. And as the NLRB points out, it is a "basic proposition that all orders and judgments of courts must be complied with promptly." *Maness v. Meyers*, 419 U.S. 449, 458 (1975). MasTec has not argued that compliance was impossible (indeed, its eventual compliance would belie any such contention) nor—as discussed more thoroughly below—has it shown that it "in good faith employed the utmost diligence" in discharging that responsibility under the NLRB Order. *Nat. Res, Def. Council v. Train*, 510 F.2d 692, 713 (D.C. Cir. 1974). Thus, the lack of a date certain by which the notice was to be provided does not undermine a finding that MasTec failed to comply with Paragraph 2(f) of the NLRB Order.[21]

In sum, the NLRB has satisfied all three requirements of its *prima facie* case.

B. Good Faith Substantial Compliance Defense

[21] MasTec does not argue that the lack of a deadline for compliance in Paragraph 2(f) rendered it unclear or ambiguous. Any such argument would fail in light of MasTec's failure to seek clarification of the sub-paragraph and its claim that it is in substantial compliance with that requirement. *See Trade Exch. Network*, 117 F. Supp. 3d at 27 (rejecting an argument that an order was ambiguous where the contemnors "never sought clarification on any part of the order and [also] claim[ed] that they have substantially complied with the order").

MasTec notes that, "[t]o rebut a *prima facie* showing of contempt, an alleged [contemnor] 'may assert the defense of good faith substantial compliance.'" ECF No. 33 at 9 (quoting *United States v. Shelton*, 539 F. Supp. 2d 259, 263 (D.D.C. 2008)); *see also In re Fannie Mae Sec. Litig.*, 552 F.3d at 822 (recognizing defense); *Food Lion*, 103 F. 3d at 1017 (same). "[T]he defense has two distinct components—(1) a good faith effort to comply with the court order at issue; and (2) substantial compliance with that court order." *Cobell v. Babbitt*, 37 F. Supp. 2d 6, 10 (D.D.C. 1999) (citing *Food Lion*, 103 F.3d at 1017). "A good faith effort may be a factor in deciding whether a contemnor has substantially complied," but "good faith alone does not excuse contempt." *Id.* (citing *Food Lion*, 103 F.3d at 1017–18). MasTec meets neither requirement here.

MasTec attempts to establish good faith by pointing to three "factors" that allegedly show its "tardiness was justifiable or at least excusable": (1) MasTec did not immediately respond to the NLRB Order as enforced by the D.C. Circuit "because it used its right to seek review by the full panel of judges of the [D.C.] Circuit" and then to seek *certiorari* from the Supreme Court, an unsuccessful process which took "several years"; (2) "[d]uring the years in which MasTec sought further court consideration and for several years thereafter, it also sought to discuss settlement with the NLRB," but the agency "consistently turned down that option"; and (3) MasTec "dealt with the NLRB's prior but unsuccessful effort to seek contempt" in the Middle District of Florida, which "[cost] additional time, but . . . result[ed] in MasTec fulfilling the documentary information demands of the NLRB." ECF No. 33 at 6.

The *MasTec* Enforcement Opinion was issued on September 16, 2016. 837 F.3d at 25. When the D.C. Circuit issued its mandate on February 22, 2017—after MasTec's petition for rehearing *en banc* was denied—that mandate was "effective" and the parties' obligations were "fixed." Fed. R. App. P. 41(c) & advisory committee's notes to 1998 amendments. Thus, by that

time (if not before, *see supra* note 20),[22] the NLRB Order as affirmed by the D.C. Circuit was enforceable. To be sure, MasTec filed a petition for a writ of *certiorari* on May 16, 2017. Petition for Writ of Certiorari, *MasTec Advanced Techs.*, 138 S. Ct. 92 (May 16, 2017) (No. 16-1370). However, "[a]bsent [ ] a petition *and the issuance of certiorari*[ ] in an order by the Supreme Court," MasTec was "bound by [the D.C. Circuit's] decision." *Atl. City Elec. Co. v. FERC*, 329 F.3d 856, 859 (D.C. Cir. 2003) (emphasis added); *see also United States v. Williams*, 400 F.3d 277, 282–83 (5th Cir. 2005) (noting that the mandate of a federal Court of Appeals "controls unless the Supreme Court says otherwise"). That is, MasTec was required to comply with the D.C. Circuit's mandate unless and until the Supreme Court granted *cert.* MasTec's own conduct indicates it understood that obligation. After filing its petition in the Supreme Court, the company filed two motions in the D.C. Circuit seeking to avoid the strictures of the mandate: the Motion for Stay and the Motion to Recall. *See* Section II.A.1, *supra*. Neither was successful. *See id.* Appropriately, then, the company does not contend that its post-mandate submissions legally suspended its obligation to comply with the NLRB Order. Rather, it appears to urge that its unsuccessful efforts to postpone the effectiveness of the NLRB Order or to annul it are actually evidence that it "took all reasonable steps within [its] power to comply" with the order, *Int'l Painters & Allied Trades Indus. Pension Fund*, 736 F. Supp. 2d at 40 (quoting *Food Lion*, 103 F.3d at 1017) (alteration in original), which is the standard by which good faith is measured in this context.[23] But avoidance of a legal obligation is not compliance with that obligation. More, even if there were a legal rule or principle to support MasTec's position that it was justified in flouting the requirements of the

[22] As noted above in the referenced footnote, MasTec does not counter the NLRB's assumption that the company's compliance should be measured from September 16, 2016, the date of the *MasTec* Enforcement Opinion.

[23] To be sure, MasTec had a right to seek a stay or recall of the mandate and to petition the Supreme Court for review of the D.C. Circuit's decision. But the company's mere exercise of those rights did not suspend its obligation to comply with that decision absent action from the D.C. Circuit or the Supreme Court.

NLRB Order until the denial of its petition for *cert.*, its conduct subsequent to that decision—there was a lag of up to seventeen months and a contempt proceeding in Florida between the denial of *cert.* and MasTec's (as yet incomplete) compliance with the NLRB Order's requirements, *see* Section II.B, *supra*—does not support a claim that it attempted in good faith to comply.

Nor do MasTec's settlement overtures to the NLRB establish its good faith. The company's approaches to the agency have nothing ostensibly to do with compliance, especially because its settlement efforts were rebuffed by the NLRB. ECF No. 33 at 6. A litigant cannot be forced to settle and a prevailing party is under no obligation "to negotiate before filing a contempt motion based on the violation of a[ ] [court order]." *PlayNation Play Sys., Inc. v. Velex Corp.*, 939 F.3d 1205, 1216 (11th Cir. 2019). It would be odd indeed to find that merely desiring to engage in settlement discussions with an unwilling adversary about a court order was evidence that a litigant had taken reasonable steps to comply with that order. More, as the D.C. Circuit has recognized, "[h]owever broad the [NLRB's] discretion may be to settle its cases prior to their embodiment in a court order, once the [NLRB] turns to the task of ensuring an employer's compliance with a final court judgment, the [NLRB's] own precedent has disclaimed any authority to modify the court's order." *Dupuy v. NLRB*, 806 F.3d 556, 562 (D.C. Cir. 2015). Thus, as the NLRB points out, even if settlement discussions had commenced and were successful, at least some of the requirements of the NLRB Order would have remained in force and MasTec's obligation as to those would be unchanged. ECF No. 3 at 18. Soliciting the NLRB to engage in settlement talks, then, does not indicate that MasTec "in good faith employed the utmost diligence," *Nat. Res. Def. Council*, 510 F.2d at 713, to comply with its obligations.

The final "factor" MasTec urges the undersigned to consider is the contempt proceeding in the Middle District of Florida. MasTec seems to contend that the fact that the company complied

with certain document requests (falling within the purview of Paragraph 2(d) of the NLRB Order) in response to the NLRB's prior contempt petition shows its diligence. *See* ECF No. 33 at 6 ("MasTec, with the assistance of the Florida District Court, dealt with the NLRB's prior but unsuccessful effort to seek contempt. That situation also [cost] additional time, but it did result in MasTec fulfilling the documentary information demands of the NLRB."), 9–10 ("MasTec fully met the requirements of the Orlando District Court in an effort to meet its obligations under the NLRB's extremely extensive subpoena, which is essentially an extension of the [NLRB's] ruling of orders to be met in this case."). The argument is befuddling. Emphasizing that MasTec complied only after being threatened with contempt is a peculiar (and ineffective) strategy to establish good faith.

Elsewhere in the record—specifically, in its response to the NLRB's statement of undisputed material facts—MasTec asserts that the NLRB here seeks a finding of contempt "based on the same or similar allegations and circumstances" as those presented to the Middle District of Florida and that, "[i]n essence, the Board chose to file the current case rather than appeal the denial of the District Court in Orlando." ECF No. 33-4 at 8. That observation is of questionable accuracy and relevance. First, the judge who addressed the NLRB's contempt motion in the Middle District of Florida expressly disclaimed that he would or could address the question at issue here: whether MasTec is in contempt of court "in relation to the [ ] case before the United States Court of Appeals for the District of Columbia." ECF No. 26-24 at 4. Rather, the Florida contempt proceeding concerned only MasTec's failure to comply with an order of that court enforcing a subpoena for production of documents. *Id.* at 1. This proceeding, on the other hand, concerns MasTec's compliance with the NLRB Order, a decree that requires conduct far beyond the production of documents. Thus, an appeal of the Middle District's denial of the NLRB's motion for contempt could

not have been a substitute for the current proceeding. Second, MasTec fails to explain why the NLRB's decision not to appeal the Florida court's decision is relevant to the motion at issue here. The company does not contend that decision precludes this Contempt Petition nor does it explain how the *NLRB's* conduct in those proceedings could establish *MasTec's* good faith efforts at compliance. In sum, MasTec has not shown that it "took all reasonable steps within [its] power to comply." *Int'l Painters & Allied Trades Indus. Pension Fund*, 736 F. Supp. 2d at 40 (quoting *Food Lion*, 103 F.3d at 1017) (alteration in original).

Nor has MasTec shown that it is in substantial compliance with the NLRB Order. The company asserts that it is because

> [a]s of the time the [Contempt] Petition was filed, [the company] had completed the following affirmative obligations set forth in the [NLRB] Order: (1) offered full reinstatement to all twenty-six (26) discriminatees; (2) removed all references of the unlawful discharge from the discriminatees['] employee files; (3) rescinded the illegal policies and rules from the 2006 employee handbook; (4) notified all employees who received the 2006 Handbook of the rescission of the policies and rules at issue; (5) posted and distributed the required Notices A and B; and (6) filed a sworn certification with the [NLRB] of the steps MasTec had thus far taken to comply.

ECF No. 33 at 10–11 (internal citations to the record omitted). It argues that "[a]ll that remained" of the affirmative actions at issue here when the Contempt Petition was filed "was the posting and distribution of the correct Notice C" and "the production of a small subset of documents requested by the [NLRB]," which it has now produced. *Id.* at 5. But that ignores the fact that the NLRB Order required compliance within set periods of time or, at least, "promptly," *Maness*, 419 U.S. at 458.

Courts have rejected claims of substantial compliance where a putative contemnor's response to an order was, as MasTec admits is the case here, late. ECF No. 33 at 6, 9. For example, in *Food Lion*, the order at issue required a public relations firm to search and produce documents

by September 15, 1995. 103 F.3d at 1019. The firm searched and produced some, but not all, responsive records by the deadline. *Id.* at 1015–16. "[E]ventually"—after the deadline had passed—it searched certain other locations for responsive records and "offered" to search still others that might include such material. *Id.* at 1019. The D.C. Circuit rejected the firm's argument that it was in substantial compliance, stating that the actions came "too late" in light of the order's requirement that the search and production occur by a date certain. *Id.* In circumstances more similar to those at issue here, the Eleventh Circuit held that a company was not in substantial compliance with an order from the NLRB to (1) reinstate two employees who had been discharged and (2) post a notice of the order at its business location because it had done neither by the date set in that order. *Ohr ex rel. NLRB v. Latino Express, Inc.*, 776 F.3d 469, 475, 477–78 (11th Cir. 2015). The fact that the company later posted the required notice did not undermine the court's conclusion that the failure to do so by the deadline established that the company "did not substantially comply." *Id.* at 478. Thus, when an order requires action within a certain period of time, a putative contemnor must have made significant and meaningful progress toward completing such action within that period in order to be found in substantial compliance. *See Trade Exch. Network*, 117 F. Supp. 3d at 27 ("Even if the defendants did substantially comply with the Order's requirements during the five months following the issuance of the Order, they were not in substantial compliance by the order's July 14, 2014 deadline."). MasTec has shown that it made little to no progress on the affirmative actions required by the NLRB Order within the time periods mandated; indeed, it responded to the bulk of the order's requirements years after their deadlines.[24]

[24] For example, the latest possible date for compliance with Paragraphs 2(a) and (c) of the NLRB Order, which required MasTec to send reinstatement offer letters to the 26 illegally-discharged employees and to remove reference to the illegal discharges within 14 days, would have been March 8, 2017—14 days after the issuance of the mandate. *See* ECF No. 33-4 at 3 (requiring compliance "[w]ithin 14 days from the date of this Order"). But MasTec did not finish sending out reinstatement offer letters until March 2019 and did not remove reference to the discharges until May 2018. As discussed above, the dates for compliance for the three requests for documents the NLRB served pursuant

For these reasons, MasTec's good faith substantial compliance defense fails. The undersigned recommends holding MasTec in contempt.

C. Remedies

As noted, the NLRB seeks an order requiring MasTec to (1) comply with its outstanding obligations under the NLRB Order, which include, at least, posting and distribution of a corrected Notice C; (2) post and distribute the contempt adjudication (assuming it is forthcoming) and a notice provided by the NLRB about that contempt adjudication; (3) permit NLRB access to MasTec facilities during regular business hours to verify that MasTec had posted the required notices; (4) distribute to all MasTec officers, managers, and supervisors a copy of the contempt adjudication and require a written acknowledgement of receipt from each of them; and (5) file a sworn certification detailing the steps MasTec has taken to comply with those directives. ECF No. 2 at 18–21. In addition to those compliance and ministerial tasks, the agency seeks payment of it costs and expenses, including attorney's fees, associated with the contempt proceeding and imposition of a set of prospective fines for any future violations of the NLRB Order (as enforced by the D.C. Circuit) and the putative contempt adjudication sought here. *Id.* at 21–22.

In response to this list of proposed remedies, MasTec first presses an overarching argument that, given its "current state of substantial compliance," the "financial and other remedies sought . . . would not serve the primary purpose of [civil] contempt—namely to obtain compliance with a court order"; rather, MasTec contends that they are designed to "punish MasTec for untimely compliance," which is the province of a criminal contempt proceeding and would require the NLRB to show willfulness. ECF No. 33 at 8; *Local 3, Int'l Brotherhood of Elec. Workers*, 471 F.3d at 403. Under Supreme Court precedent, "[a] contempt proceeding is either civil or criminal

to Paragraph 2(d) in 2017 (after the issuance of the mandate) and 2018 were March 23, 2017, April 19, 2017, and February 19, 2018, but MasTec did not comply until March 2019.

by virtue of its 'character and purpose.'" *Cobell v. Norton*, 334 F.3d 1128, 1145 (D.C. Cir. 2003) (quoting *Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 827 (1994)). As the D.C. Circuit has indicated, "the nature of the contempt" is often determined by the sanction imposed rather than by the label applied by the court or a litigant. *See id.* at 1145; *cf. In re Fannie Mae Sec. Litig.*, 552 F.3d at 823 (determining whether district court's order was in the nature of a contempt order by finding that "the *sanction* functioned as a contempt sanction"). Only criminal contempt can be "used to punish, that is, to 'vindicate the authority of the court' following a transgression"; civil contempt, on the other hand, is used either to "compel future compliance or to aid the [complainant]" by "compensat[ing] [it] for losses sustained." *Cobell*, 334 F.3d at 1145 (quoting *Bagwell*, 512 U.S. at 828, 829); *see also Ohr*, 776 F.3d at 479 ("A civil contempt order can serve to coerce a party to obey a court order, or it can be intended to compensate a party who has suffered unnecessary injuries or costs because of contemptuous conduct."). Nevertheless, a civil contempt sanction can be used to enforce court-ordered deadlines that the contemnor has missed both to compensate for any delay caused and for any expenses incurred. *See In re Fannie Mae Sec. Litig.*, 552 F.3d at 818, 823 (affirming the district court's finding of contempt and sanction as a "proper exercise of the . . . [civil] contempt power because it coerced compliance with the [ ] order and compensated the individual defendants for the delay they suffered," even where the contemnor had largely complied after the deadline); *see also Ohr*, 776 F.3d at 479 (affirming the district court's contempt finding and sanction requiring a company that tardily complied with its court-ordered obligations to pay the NLRB's costs and expenses, including attorney's fees); *Trade Exch. Network*, 117 F. Supp. 3d at 27 (imposing civil contempt sanctions on litigant who failed to comply with a court order by its deadline notwithstanding that it thereafter complied). And, as the Ninth Circuit has explained, "[sanctions] for completed conduct still have a remedial purpose when the

court order remains in place and future compliance is sought." *NLRB v. Ironworkers Local 433*, 169 F.3d 1217, 1221 (9th Cir. 1999). In all cases, the sanction should be tailored to remedy the contumacious conduct. *See, e.g.*, *Int'l Painters & Allied Trades Indus. Pension Fund*, 736 F. Supp. 2d at 38 ("When selecting what sanction to impose, a court must 'exert only so much authority of the court as is required to assure compliance.'" (quoting *SEC v. Bankers Alliance Corp.*, 881 F. Supp. 673, 678 (D.D.C. 1995))).

MasTec's argument that any sanction imposed in this case would necessarily be punitive—and therefore criminal in nature—because its violations have already been remedied is misplaced. As both the Second and Ninth Circuits have stated, "no court has ever held that [NLRB] enforcement proceedings are criminal in nature, for the [National Labor Relations Act] is generally regarded as a civil regulatory and remedial statute." *Local 3, Int'l Brotherhood of Elec. Workers*, 471 F.3d at 405 (alterations in original) (quoting *Ironworkers Local 433*, 169 F.3d at 1219). In any case, MasTec admits that it is still in violation of at least one of the requirements of the NLRB Order—the posting of a compliant Notice C. As the NLRB points out, the Supreme Court has recognized the importance of such postings when a business entity has violated the NLRA and approved of contempt sanctions when such a company fails to post a required notice. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 (2002) (calling a requirement that a company post a notice setting forth employees' rights and detailing its past illegal practices a "significant sanction[ ]," the failure to comply with which will subject the company to contempt proceedings); *NLRB v. Falk Corp.*, 308 U.S. 453, 462–63 (1940) (describing the importance of such notices). This particular notice signed by a representative of DirecTV is necessary, the NLRB contends, so that employees know that "another actor responsible for the termination of the 26 Discriminatees is also responsible for taking remedial action." ECF No. 35 at 15. A sanction is warranted here

in light of MasTec's repeated and continuing failure to post and distribute the proper notice, notwithstanding that the NLRB has more than once provided copies of a compliant notice and that MasTec recognizes that the notice it has posted and distributed is not compliant. Moreover, the NLRB has represented that MasTec's document production obligations are likely to continue: the agency has not yet determined whether the reinstatement offers MasTec has sent are sufficient, a decision that may affect the period and amount of back pay owed to the illegally-discharged employees and require additional documents from the company. ECF No. 35 at 22 n.31. MasTec, too, recognizes that such obligations endure, asserting that it "is committed to provide any necessary documentation within its possession and control in order to move this matter toward resolution." ECF No. 33 at 13. Again, the company's long history of noncompliance with such obligations confirms the appropriateness of some sanction to encourage future compliance. *See, e.g.*, *Ironworkers Local 433*, 169 F.3d at 1221 ("[Sanctions] for completed conduct still have a remedial purpose when the court order remains in place and future compliance is sought.").

1. Remedies Related to Purging Contempt, Notice, and Certification

MasTec has not specifically addressed a number of the sanctions that the NLRB has requested. Three of those mandate that MasTec correct failures in its compliance with the obligations of the NLRB Order. First, the NLRB seeks (1) to require the company and its officers, agents, successors and assigns to "purge themselves of [ ] contempt by, to the extent they have not already done so, fully complying with and obeying the September 16, 2016 Judgment" of the D.C. Circuit. ECF No. 2 at 18 (Paragraph C). Targeting specific deficiencies, it also asks for an order requiring MasTec (2) to provide the agency with any outstanding requested records and (3) to post in the

Orlando facility and electronically distribute to its employees a copy of Notice C signed by a representative of DirecTV and certify that such posting and distribution has occurred. *Id.* at 18–19 (Paragraphs D(1) & (2)). Those are appropriate remedies for the company's contempt.

Three more proposed remedies are related to Notice C and an additional notice. The NLRB asks for an order requiring MasTec to post, at all of its facilities, copies of the D.C. Circuit's (putative) contempt adjudication along with a notice (to be provided to the company by the agency) signed by an agent of MasTec outlining the actions the company will take to purge its contempt (the "Contempt Notice"); that Contempt Notice will also be electronically distributed to all employees and MasTec must certify that such posting and distribution has occurred. *Id.* at 20–21 (Paragraph D(3)). Additionally, the NLRB asks that MasTec be ordered to distribute the Contempt Notice to all "current officers, managers, and supervisors of MasTec" and require each of those individuals to return a written acknowledgement of receipt. *Id.* at 21 (Paragraph D(5)). And, the NLRB seeks access to MasTec's premises by its agents to verify the posting of a compliant Notice C (in the Orlando facility) and the Contempt Notice (at its facilities nationwide). *Id.* (Paragraph D(4)). As noted, the Supreme Court has approved the posting of notices regarding violations of the NLRA. *Hoffman Plastic Compounds*, 535 U.S. at 152; *Falk Corp.*, 308 U.S. at 462–63. The D.C. Circuit has ordered contemnors to post and otherwise disseminate copies of contempt adjudications. *See, e.g.*, *Dallas Gen. Drivers, Loc. Union No. 745 v. NLRB*, 500 F.2d 768, 771 (D.C. Cir. 1974) (requiring that the contemnor company post the contempt adjudication, assemble the company's employees to read the notice to them, and mail copies of the adjudication to current and former employees); *see also NLRB v. Blevins Popcorn Co.*, No. 75-1748, 1984 WL 180701, at *1 (D.C. Cir. Sept. 19, 1984) (per curiam) (requiring posting of contempt adjudication); *W. Tex. Utilities Co. v. NLRB*, 206 F.2d 442, 448 (D.C. Cir. 1953) (same). Courts have also required

companies to allow the agency access to facilities to monitor compliance with a posting requirement, *see, e.g.*, *Gold v. State Plaza, Inc.*, 481 F. Supp. 2d 43, 52 (D.D.C. 2006) ("[Defendant] shall . . . grant reasonable access to [its] facilities to agents of the [NLRB] for the purpose of monitoring compliance with th[e] posting requirement."); *D'Amica ex rel. NLRB v. U.S. Serv. Indus., Inc.*, 867 F. Supp. 1075, 1102 (D.D.C. 1994) ("Agents of the [NLRB] shall be granted reasonable access to the [company's] offices, facilities[,] and work locations to monitor compliance with th[e] posting requirement."), and company managers to file written acknowledgments of contempt orders, *see, e.g.*, *NLRB v. Kidd*, Nos. 86-6042, 86-6103, 1991 WL 345312, at *2 (6th Cir. Sept. 12, 1991). MasTec has failed to make any targeted objection to these remedies, and the undersigned recommends adopting them.

The last of the NLRB's proposed remedies to which MasTec has not specifically objected would require the company to file a sworn certification detailing the steps MasTec took to comply with the directives above. ECF No. 2 at 21 (Paragraph D(6)). That is a commonplace requirement that should be ordered. *See, e.g.*, *Blevins Popcorn*, 1984 WL 180701, at *2; *Dallas Gen. Drivers*, 500 F.2d at 771.

2. Prospective Fines

As noted, the NLRB does not seek fines for past violations of the NLRB Order; rather, it requests an order imposing prospective fines—that is, fines to be imposed for violations of the NLRB Order and the putative contempt adjudication sought here that post-date the effective date of that order of contempt. It seeks, first, a fine of $100,000 for each violation of either of those orders, plus an additional fine of $2,500 per day for each day the violation continues to be assessed against MasTec, and, second, a separate prospective fine of $1,000 for each future violation and $100 per day for each day that violation continues to be assessed against any of MasTec's officers,

agents, or representatives who act in concert with MasTec to violate the NLRB Order or D.C. Circuit contempt adjudication. ECF No. 2 at 22 (Paragraph E). MasTec objects, asserting that the proposed fines are "[e]xcessive and [u]nreasonable" because they would be imposed equally without regard to the severity of the violation; because any of its contumacious conduct was not sufficiently flagrant to merit such sanctions; and because they would apply to individual officers, agents and representatives who are not parties to this action. ECF No. 33 at 15–18.

MasTec quotes, at some length, a Seventh Circuit case addressing prospective fines. ECF No. 33 at 16. In *Blankenship & Associates,* that court refused to approve a consent order that imposed a set prospective fine for any violation of the order, "without regard for the circumstances of the violation (for example, whether it is major or minor, whether it is isolated or continuing, and whether it is the first or a subsequent violation)," so that "[a] deliberate flouting of the entire order by a compulsive recidivist [would] be punished with exactly the same severity as an unintentional technical violation of a trivial provision." 54 F.3d at 449. A few facts undermine the relevance of that case to the situation here. First, its procedural posture was materially different. The *Blankenship* Court was particularly concerned that the company against which the order was to be entered had not been found to be in contempt; rather, the proposed order was the product of an agreement between the parties that preceded any such finding. *Id.* ("The [NLRB] could have asked us to impose a monetary sanction for Blankenship's (alleged) contempt, but it would have had to prove the contempt. Instead it settled with Blankenship for the entry of a[n] [ ] injunctive-type order by this court."). Indeed, the court distinguished the case before it, in which "[t]here was no determination of contempt," from cases where there had been such a determination and prospective noncompliance fines were appropriately imposed; it analogized a prospective fine imposed on a contemnor to "a civil fine for contempt that is forgiven if the contempt is purged,"

noting that, by ceasing its contemptuous activities, the contemnor will avoid any prospective fines. *Id.* at 450. Thus, in a case of contempt, the prospective fine fits comfortably within the type of civil contempt remedy the Supreme Court has approved—one in which the contemnor "carries the keys of his prison in his own pocket." *Bagwell*, 512 U.S. at 828 (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 442 (1911)). As the Seventh Circuit noted, where there has been no contempt finding, the analogy to the forgivable contempt fine no longer holds, and "the only function served by fixing a prospective fine is notice" to a litigant rather than coercing compliance by a contemnor. *Blankenship*, 54 F.3d at 450.

Second, the Seventh Circuit worried that the scheme at issue in *Blankenship* was "inflexible" and could be "arbitrari[ly]" enforced. *Id.* at 449, 450. Here, however, the NLRB has made clear in its briefing that any prospective fines could "only be imposed in a new contempt proceeding, which would again require clear and convincing evidence of another violation," (ECF No. 35 at 23), and would enable MasTec to assert defenses. Third, the D.C. Circuit has itself imposed prospective noncompliance fines of a type similar to those sought here in cases of contempt, including lump sum prospective fines in tandem with continuing fines. *See, e.g.*, *Dallas Gen. Drivers*, 500 F.2d at 771 ("To insure against further violations of our decrees, we have decided that a fine will be levied prospectively against the Company for each day of further noncompliance. The fine will be $250 per violation per day. Such prospective fines are traditionally applied when parties have exhibited a marked recalcitrance to obey court decrees."); *W. Tex. Utilities Co.*, 206 F.2d at 449 (D.C. Cir. 1953) ("Upon [the companies'] failure to make [ ] a showing [of compliance], this court will deal further with the matter by imposing a compliance fine of $30,000.00 on respondent West Texas Utilities Company, Inc., and $15,000.00 on respondent Price Campbell and a further compliance fine of $1,000.00 a day on respondent West Texas Utilities Company, Inc.,

and $500.00 a day on respondent Price Campbell for each day of continued non-compliance thereafter and by such other means as the court shall then determine." (footnote omitted)); *Cf. Local 3, Int'l Brotherhood of Elec. Workers*, 471 F.3d at 404–05 (approving imposition of lump sum prospective fine in addition to *per diem* fine for the length of time the violation continued); *NLRB v. Me. Caterers, Inc.*, 732 F.2d 689, 692 (1st Cir. 1984) (imposing a prospective compliance fine in addition to a fine for each day a violation continued).

MasTec indicates that continuing *per diem* fines should not be assessed against it because such fines are "traditionally applied when parties have exhibited a marked recalcitrance to obey court decrees." *Dallas Gen. Drivers*, 500 F.2d at 771; *see* ECF No. 33 at 15. It cites cases indicating that such fines should be imposed only "where violations have been flagrant and lesser remedies appear to fail." ECF No. 33 at 16 (quoting *NLRB v. Trailways, Inc.*, 729 F.2d 1013, 1023 (5th Cir. 1984)). But that standard is met here. As shown above, MasTec failed to perform many of the affirmative acts required by the NLRB Order for months or years after the D.C. Circuit enforced that order. *Cf., e.g.*, *Trailways*, 729 F.2d at 1023 (finding prospective fines inappropriate where the contumacious conduct of disparate enforcement of solicitation and distribution rules "occurred over a limited time period—two days"). MasTec has also shown "marked recalcitrance" to obey court decrees. It did not obey the NLRB Order as enforced by the D.C. Circuit, which was sufficient for imposition of *per diem* compliance fines in *Dallas General Drivers*, 500 F.2d at 771 (levying a daily fine for noncompliance for failure to obey a court-enforced NLRB order).[25] More, it failed to comply with the Middle District of Florida's order enforcing the NLRB's subpoena (until threatened with contempt). And, as the NLRB has made clear, any prospective fines will

[25] In *Dallas General Drivers*, the NLRB brought two contempt petitions to try to compel compliance, rather than the one that has been brought here. 500 F.2d at 769. However, the D.C. Circuit consolidated the petitions and decided them together. *Id.* Thus, the *per diem* fines were not imposed upon a second finding of contempt, but rather upon an initial finding of contempt for failing to obey a court-enforced NLRB order.

not be imposed unless and until MasTec is *again* found to be in contempt by the D.C. Circuit. ECF No. 35 at 23. As a general matter, then, prospective and continuing fines are an appropriate remedy here.

However, MasTec also makes two arguments about the specifics of the proposed prospective fines. One, it contends that both the proposed $100,000 fine for each new violation of the NLRB Order and the putative order imposing remedies for contempt and the proposed $2,500 *per diem* fine are too high and suggests that, if any such fines are to be imposed, those amounts should be slashed. ECF No. 33 at 17–18. Neither party has done a particularly good job of briefing this issue. MasTec contends that the undersigned should follow the Tenth Circuit's decision in *NLRB v. Monfort, Inc.*, which adopted the Special Master's recommendation that a fine of $200,000 per violation was excessive and unnecessary to remedy violations that were "isolated and sporadic, rather than pervasive and continuous." 29 F.3d 525, 529 (10th Cir. 1994) (quoting Special Master's report, *Monfort, Inc. v. NLRB*, Nos. 90-9518, 90-9527, 90-9501, 1994 WL 121150, at *25 (10th Cir. Mar. 30, 1994)). But in that case, the Special Master found a mere handful of discreet violations over the course of a two-year period. *See Monfort*, 1994 WL 121150 at *18–22. Here, the violations were not isolated or sporadic; they related to almost every one of the remedial affirmative acts in the NLRB Order and continued for years—indeed, they continue still.

For its part, the NLRB parrots the rule that a court imposing fines must "consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired," *United States v. United Mine Workers*, 330 U.S. 258, 304 (1947), but fails to contend with the fact that MasTec's violations, though flagrant and continuing, concern *only* the remedial provisions of the NLRB Order and do not—as was the case in *Monfort*, for example—consist of conduct violative of the NLRA, itself.

To be sure, MasTec's contumacious conduct is unquestionably pernicious; flouting court orders "harm[s] not only the system but the other participants in the process," *Anderson v. Beatrice Foods, Co.*, 900 F.2d 388, 395 (1st Cir. 1990), and here it has delayed, among other things, the goal of making whole the illegally-discharged employees. However, the NLRB has not cited a similar case in which a court imposed a fine of $100,000 per violation. Nor has the NLRB appropriately supported its argument that such substantial fines are warranted in order "to be noticed by a company with reported annual revenue in the billions." ECF No. 35 at 21; ECF No. 26-2 at 24 & n.9. The agency cites a press release available on MasTec, Inc.'s website to support its assertion that MasTec, Inc., is a multi-billion-dollar company. ECF No. 26-2 at 24 n.9 (citing *MasTec Announces Strong Fourth Quarter and Annual 2019 Financial Results and Issues Record 2020 Guidance*, MasTec (Feb. 27, 2020), https://www.mastec.com/press-release/2209/mastec-announces-strong-fourth-quarter-and-annual-2019-financial-results-and-issu (last visited June 2, 2021). Generally, although a court may take judicial notice of documents such as a press release, it should do so only to establish the fact that the statements in the release were made and not for the truth of those statements. *See, e.g.*, *ScripsAmerica, Inc. v. Ironridge Global LLC*, 119 F. Supp. 3d 1213, 1231 (C.D. Cal. 2015). The press release can therefore be judicially noticed for the fact that MasTec. Inc. *reported* billions of dollars in revenue, but not that the representation is true. Moreover, MasTec, Inc., the company that has reported such revenue, is neither the putative contemnor here nor even a party to this case. Rather, it is MasTec Advanced Technologies, LLC—a division of MasTec, Inc.—that is bound by the NLRB Order as enforced by the D.C. Circuit. The NLRB has provided no information about the corporate structure of MasTec, Inc., the financial position of MasTec Advanced Technologies, LLC, or which entity would be responsible for paying these

prospective fines. The NLRB has not appropriately supported an argument that depends on establishing the wealth of the putative contemnor here.

The undersigned therefore recommends reducing the requested prospective lump-sum fine to $50,000 to be assessed against the company for future violations of the NLRB Order and the putative contempt adjudication—that is, violations that post-date the effective date of the putative order of contempt sought here and that are proved through a further contempt proceeding. *See, e.g.*, *W. Tex. Utilities Co.*, 206 F.2d at 449 (D.C. Cir. 1953) (imposing, in 1953, a $30,000 fine for violations). The undersigned recommends approving the requested *per diem* fine of $2,500 for future violations, to be measured from the effective date of the putative contempt order sought here. *See Local 3, Int'l Brotherhood of Elec. Workers*, 471 F.3d at 405 (approving, in addition to a lump-sum fine, "an additional $5,000 per day for each day that a violation continue[s]").

Finally, MasTec objects to the proposed prospective fines—of $1,000 for each future violation and $100 per day for each day that violation continues—to be assessed against MasTec's officers, agents, or representatives who "act in concert with MasTec and with notice and knowledge of the [NLRB Order] or this contempt adjudication." ECF No. 2 at 22. The NLRB does not explain why such fines are necessary—it does not, for example, provide evidence of individuals who have "acted in concert" with the company in relation to the NLRB Order. Nor does it explain what, precisely, "act[ing] in concert with MasTec" might look like. *Cf. Blankenship*, 54 F.3d at 449 (refusing to order fines against individuals who "impede[ ] compliance with" an order because of the vagueness of the phrase). Because the NLRB has not shown that such fines are necessary to coerce continued compliance with the NLRB Order and the putative contempt adjudication, the undersigned recommends rejecting them. *See Local 3, Int'l Brotherhood of Elec. Workers*, 471 F.3d at 406 (declining to impose fine against individuals).

3. Expenses Including Attorney's Fees

The D.C. Circuit has recognized that attorney's fees and expenses are an available compensatory remedy in a contempt case. *See, e.g.*, *Food Lion*, 103 F.3d at 1017 n.14 ("[D]espite the general American rule against fee-shifting, we see no reason why a district court should not be authorized to include legal fees specifically associated with the contempt as part of the compensation that may be ordered to make the plaintiff whole, even absent a showing of willful disobedience by the contemnor. Numerous courts have so held."); *W. Tex. Utilities Co.*, 206 F.2d at 448–49 (ordering the contemnor to "[p]ay all court costs and an amount adequate to compensate the [NLRB] for its costs and expenses, including salaries, in investigating, preparing and presenting the matters involved in these proceedings; the amount of such compensation to be determined upon proof submitted by the [NLRB] when these proceedings are finally concluded."); *Motley v. Yeldell*, 664 F. Supp. 557, 559 (D.D.C. 1987) ("[T]he cost of bringing the violation to the attention of the court is part of the damages suffered by the prevailing party and those costs would reduce any benefits gained by the prevailing party from the court's violated order." (quoting *Cook v. Ochsner Found. Hosp.*, 559 F.2d 270, 272 (5th Cir. 1977))).

MasTec contends that its "substantial compliance" obviates the need for an award of attorney's fees because "[w]here a party has 'substantially complied' with a Court's Order, the Court's contempt powers are not needed to remedy any violations of that order, and thus an award of fees is inappropriate." ECF No. 33 at 14. However, its substantial compliance argument fails for the reasons stated in Section III.B, *supra*. In any event, as is clear in the cases cited above, an award of fees is not a coercive remedy, but a compensatory one. *See also In re Fed. Facilities Realty Tr.*, 227 F.2d 657, 658 (7th Cir. 1955) ("The rule to be spelled out from the court decisions is that a party compelled to resort to a civil contempt proceeding to preserve and enforce an adjudicated

right is entitled to a decree by way of a fine for injuries actually sustained by him because of the contemptuous act, which may include, in the discretion of the court, an award of reasonable attorney's fees." (internal citations omitted)); *Landmark Legal Found. v. EPA*, 272 F. Supp. 2d 70, 76 (D.D.C. 2003) ("The contempt sanction here, Landmark's attorney[']s fees and costs caused by EPA's contumacious conduct, is designed to compensate Landmark . . . .").

MasTec then argues that its contumacious conduct was not sufficiently frequent or severe to merit an award of attorney's fees. ECF No. 33 at 14–15 (citing *Landmark Legal Found.*, 272 F. Supp. 2d at 87). But as the discussion above has established, MasTec violated nearly every remedial provision of the NLRB Order and continued its violations for months and years. Indeed, those violations continued until after the Contempt Petition was filed, when MasTec finally provided certain records requested by the NLRB to allow the agency to calculate the back pay due to the illegally-discharged employees, and continue today with regard to Notice C. ECF No. 33-4 at 22–24, 31. In these circumstances, the undersigned recommends an award of costs and attorney's fees.

The NLRB has asked for its fees to be paid at market rates and MasTec has asked to be heard on the amount of fees claimed by the NLRB. ECF No. 26-2 at 25; ECF No. 33 at 14 n.4. Further proceedings geared to calculating the amount of fees due to the NLRB are premature prior to the D.C. Circuit's adoption or rejection of the recommendations herein that (1) MasTec should be found to be in contempt and (2) that payment of the NLRB's attorney's fees is an appropriate remedy. More, a calculation of those fees is arguably beyond the authority of the undersigned as Special Master. In the order instituting these proceedings, the D.C. Circuit empowered the undersigned to "recommend factual findings and disposition" as to the Contempt Petition but reserved

for itself "[f]inal assessment of all costs, fees, and expenses, including those incurred in proceedings before the Special Master." ECF No. 1 at 2–3. That is, the D.C. Circuit appears to have carved out the issue of attorney's fees from the other recommendations that the undersigned is authorized to make.

IV. CONCLUSION

For the foregoing reasons, the undersigned recommends that the NLRB's Contempt Petition be granted to the extent that MasTec is adjudicated in contempt of Court for its violations of the NLRB Order as enforced by the D.C. Circuit and granted in part and denied in part as to the remedies sought. Specifically, the Court should grant the relief sought in Paragraphs C and D(1) through D(6) of the Contempt Petition and also award the NLRB costs and expenses, including reasonable attorney's fees in an amount to be determined. ECF No. 2 at 18–22. It should also grant the request for prospective fines against MasTec, but in the amounts of $50,000 for each future violation of the NLRB Order or any order adjudging MasTec in contempt and a continuing fine of $2,500 per day for each day (measured from the effective date of any contempt order arising from this proceeding) that the Court finds the violations to have continued, as determined in a further contempt proceeding. The request for prospective fines to be assessed against MasTec's officers, agents, and representatives who act in concert with MasTec should be denied. *Id.* at 22.

* * * * *

Pursuant to the Order issued by the D.C. Circuit on April 9, 2020, either side may file written objections to this Report and Recommendation, but any such objection must be filed with the U.S. Court of Appeals for the D.C. Circuit and served on the other side within 20 days after issuance by the Clerk of Court for the U.S. Court of Appeals for the D.C. Circuit of notice of the filing of this Report and Recommendation. If both sides intend to file objection, Petitioner must

file and serve its brief within the following 20 days, Respondent 20 days thereafter, and Petitioner may thereafter reply only to the objections raised by the responding party within 10 days. The objection and response shall not exceed 5,200 words. Any reply may not exceed 2,600 words.

Digitally signed by G. Michael Harvey
Date: 2021.06.03 09:29:53 -04'00'

Date: June 3, 2021

G. MICHAEL HARVEY
UNITED STATES MAGISTRATE JUDGE